

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICROSOFT CORPORATION,

Plaintiff,

v.

BC TECH GEAR, and
JASON W. HAGEN,

Defendants.

CASE NO. 1:09cv2094 AWI SKO

ORDER GRANTING IN PART AND DENYING
IN PART PLAINTIFF'S REQUEST FOR
EXTENSION OF TIME TO SERVE AMENDED
COMPLAINT

This matter is before the Court upon Plaintiff's status report (Doc. 12), which the Court construes as a motion for an extension of time in which to serve the amended complaint upon Defendants. On December 1, 2009, Plaintiff filed a complaint against Defendant BC Tech Gear, alleging, *inter alia*, copyright and trademark infringement. (Doc. 1.) On December 2, 2009, the Court set the initial scheduling conference for March 2, 2010. (Doc. 4.) Plaintiff amended its complaint on February 16, 2010, to include Jason W. Hagen as a defendant doing business as BC Tech Gear. (Doc. 5.)

On February 23, 2010, Plaintiff filed a status report requesting that the scheduling conference "be continued thirty days to allow time for Mr. Hagen to be served with the First Amended Complaint." (Doc. 7 at 2.) The Court granted Plaintiff's request and continued the scheduling

1 conference to May 10, 2010. (Doc. 8.) The Court reassigned this matter to the undersigned on April
 2 15, 2010. (Doc. 9.) On April 21, 2010, the Court reset the scheduling conference to May 10, 2010.
 3 (Doc. 10.)

4 Plaintiff failed to file a joint scheduling report seven (7) days before the May 10, 2010,
 5 scheduling conference pursuant to the Court's Scheduling Conference Order under Fed. R. Civ. P.
 6 16 and Local Rule 240. The Court, therefore, ordered Plaintiff to file a status report no later than
 7 May 5, 2010, regarding the service of the complaint and directed Plaintiff to appear telephonically
 8 on May 10, 2010. (Doc. 11.) On May 5, 2010, Plaintiff filed a status report indicating that it "has
 9 diligently attempted to have Mr. Hagen served with the Complaint," as it "is unaware of Mr. Hagen's
 10 current location and has requested the assistance of a private investigator in Washington in order to
 11 locate him for service." (Doc. 12 at 2.) Plaintiff, therefore, "requests an additional 45 days to allow
 12 time for it to locate Mr. Hagen and serve him with the First Amended Complaint." (Doc. 12 at 2.)
 13 As discussed more fully below, Plaintiff's request is GRANTED IN PART and DENIED IN PART.

14 DISCUSSION

15 Rule 4(m) of the Federal Rules of Civil Procedure provides:

16 If a defendant is not served within 120 days after the complaint is filed, the court—on
 17 motion or on its own after notice to the plaintiff—must dismiss the action without
 18 prejudice against that defendant or order that service be made within a specified time.
 But if the plaintiff shows good cause for the failure, the court must extend the time
 for service for an appropriate period.

19 Fed. R. Civ. P. 4(m). "Good cause to avoid dismissal may be demonstrated by establishing, at
 20 minimum, excusable neglect." *Lemoge v. United States*, 587 F.3d 1188, 1198 n.3 (9th Cir. 2009).
 21 In order to establish good cause, a plaintiff may be required to show that "(a) the party to be served
 22 received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff
 23 would be severely prejudiced if his complaint were dismissed." *Id.* Neither lack of prejudice by
 24 itself nor inadvertence of counsel is sufficient to establish good cause, however. *United States v.*
 25 *2,164 Watches*, 366 F.3d 767, 773 n.2 (9th Cir. 2004); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th
 26 Cir. 1985) (per curiam).

27 Even absent good cause, Rule 4(m) permits the Court to grant an extension of time. *Efaw*
 28 *v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). Although district courts have broad discretion to

1 extend time for service under Rule 4(m), however, that discretion is not limitless. *Id.* at 1041.
2 Factors that the Court may consider in exercising its discretion include a statute of limitations bar,
3 prejudice to the defendant, actual notice of a lawsuit, and eventual service. *Id.*

4 The facts of this case counsel in favor of granting Plaintiff additional time in which to serve
5 Defendants. Since Plaintiff's filing of its initial complaint in December 2009, Plaintiff had "been
6 working diligently to identify the owner of BC Tech Gear" and attempted service of the complaint
7 at an address in Fresno, California, identified in a notice of state tax lien recorded in Fresno County.
8 (Doc. 7 at 1-2.) Plaintiff determined that no entities or persons related to BC Tech Gear were located
9 at that address, however. (Doc. 7 at 2.) Plaintiff subsequently identified Jason W. Hagen in
10 Washington as doing business as BC Tech Gear and amended its complaint to include Mr. Hagen as
11 a defendant.

12 According to Plaintiff, Mr. Hagen remains ensconced somewhere in Washington. Although
13 Plaintiff has located the address of Mr. Hagen's former business, which is apparently a former
14 residence of his parents, Plaintiff has heretofore been unable to locate him in order to serve the
15 amended complaint. Moreover, despite Plaintiff's earlier notice to Defendants in 2007 and 2009 of
16 Defendants' alleged distribution of counterfeit Microsoft software, Defendants may still be engaging
17 in infringing conduct. (Doc. 5 ¶¶ 20, 24; Doc. 12 at 2.)

18 In light of the foregoing, delay in this case is the result of neither inadvertence nor neglect
19 by Plaintiff's counsel. Nor is the delay extraordinary. *Cf. Efaw*, 473 F.3d at 1041 (holding that
20 plaintiff's seven-year delay in serving defendant was extraordinary). Rather, Plaintiff has reasonably
21 explained its failure up to this point to serve Defendants. *Cf. id.* ("Plaintiff offered no reasonable
22 explanation for his seven-year failure to serve Defendant. There was no evidence that Defendant
23 attempted to evade service, that she left the state, or that she took any other action that contributed
24 to Plaintiff's delay.") Although there is no evidence in the record that Defendants knew that Plaintiff
25 had filed its amended complaint, Plaintiff had previously notified Defendants of their allegedly
26 infringing conduct. Furthermore, the Court finds that Defendants would suffer little, if any prejudice
27 at this time if the Court granted Plaintiff an extension of time. On the other hand, Plaintiff would
28 be severely prejudiced if its amended complaint were dismissed. Under these circumstances,

1 therefore, good cause exists under Fed. R. Civ. P. 4(m) to extend the time for Plaintiff to serve the
2 amended complaint upon Defendants.

3 **CONCLUSION**

4 For the reasons stated above, the Court finds that good cause exists to extend the time for
5 Plaintiff to serve the amended complaint. ACCORDINGLY, IT IS ORDERED that

- 6 1) The telephonic status conference set for May 10, 2010, at 9:30 a.m. is VACATED;
7 2) Plaintiff's request for an extension of time in which to serve the amended complaint
8 is GRANTED IN PART and DENIED in PART;
9 3) Plaintiff shall serve the amended complaint upon Defendants **no later than June 10,**
10 **2010;** and
11 4) The Initial Scheduling Conference is reset to **June 24, 2010, at 9:15 a.m.** The parties
12 are reminded that a joint scheduling conference report must be filed with the Court
13 seven (7) days prior to the June 24, 2010 scheduling conference.

14
15 IT IS SO ORDERED.

16 **Dated: May 6, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE